

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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SAN MIGUEL HOSPITAL CORP. d/b/a  
ALTA VISTA REGIONAL HOSPITAL

Case Nos. 28-CA-21896  
28-RC-6518

And

DISTRICT 1199NM, NATIONAL UNION OF  
HOSPITAL AND HEALTHCARE EMPLOYEES

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**RESPONDENT / EMPLOYER'S OPPOSITION TO ACTING GENERAL  
COUNSEL'S MOTION TO SUPPLEMENT MOTION FOR SUMMARY  
JUDGMENT AND RECORD, AND RESPONDENT / EMPLOYER'S  
CROSS-MOTION FOR SUMMARY JUDGMENT**

As the Respondent / Employer in the above-captioned cases, San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital (hereafter, "Alta Vista" or the "Hospital") hereby opposes, by and through the Hospital's Counsel, the Acting General Counsel's Motion to Supplement Motion for Summary Judgment and Record (hereafter, at times, the "Motion"), and hereby cross-moves, by and through the Hospital's Counsel, for Summary Judgment in Case No. 28-CA-21896 (hereafter, at times, the "Cross-Motion").

**BACKGROUND**

**1.) The Union's Petition**

On April 10, 2007, District 1199NM, National Union of Hospital and Healthcare Employees (hereafter, the "Union") filed with Region 28 of the

National Labor Relations Board (hereafter, the “Board”) a Petition for Certification of Representative, which was assigned Case No. 28-RC-6518. In the Petition, the Union sought to represent a Bargaining Unit (hereafter, the “Unit”) which consisted of nearly the entirety of Alta Vista’s workforce. On June 21, 22 and 23, 2007, an Election (hereafter, the “Election”) was held at Alta Vista’s facility. The outcome of the Election was in the Union’s favor. Thereafter, the Hospital filed Objections to the Election (hereafter, the “Objections”). On March 4, 2008, the Board, acting through two Members, issued a Decision and Certification of Representative (hereafter, at times, the “2008 Certification”) in which the agency purported to overrule the Objections and certify the Union as the exclusive bargaining representative of the Unit.

## **2. The Refusal to Bargain Proceedings**

In the wake of the Certification, Alta Vista refused to bargain with the Union. Consequently, the Union filed an Unfair Labor Practice Charge, which was assigned Case No. 28-CA-21896, alleging the Hospital’s refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”). On May 15, 2008, the General Counsel, *via* the Regional Director for Region 28 (hereafter, the “Regional Director”), issued a Complaint which incorporated the Union’s allegations (hereafter, the “Complaint”), and shortly thereafter, filed a Motion for Summary Judgment with

the Board (hereafter, at times, the “Motion for Summary Judgment”). On June 30, 2008, the Board, once again acting through only two Members, issued a Decision and Order (hereafter, at times, the “Board’s 2008 Decision”) in which the Board purported to conclude that Alta Vista’s failure to bargain with the Union violated Sections 8(a)(1) and 8(a)(5) of the Act. See San Miguel Hospital Corp., 352 NLRB No. 100.

### **3.) The Proceedings Before the Court of Appeals**

By a Petition for Review filed with the United States Court of Appeals for the District of Columbia Circuit on July 14, 2008, Alta Vista requested that the Court vacate the Board’s 2008 Decision. See Case No. 08-1245, Consolidated With Case No. 08-1300. On September 20, 2010, the Court granted Alta Vista’s Petition for Review, insofar as the Board’s Decision, along with the 2008 Certification, were issued by a two-Member Board. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). The Court remanded the case to the Board and the attendant mandate was issued on September 24, 2010.

### **4.) The Proceedings After the Court of Appeals’ Remand**

On September 27, 2010, Alta Vista filed with the Regional Director six (6) RM Petitions (hereafter, collectively, the “RM Petitions”) in which the Hospital sought an election in a unit comprised of Alta Vista’s (1) technical employees (Case No. 28-RM-620), (2) registered nurses (Case No. 28-RM-621), (3) non-

professional employees (Case No. 28-RM-622), (4) business office clerical employees (Case No. 28-RM-623), (5) skilled maintenance employees (Case No. 28-RM-624), and (6) professional employees (Case No. 28-RM-625).

On September 30, 2010, the Board, now acting through three Members, issued a Decision, Certification of Representative and Notice to Show Cause (hereafter, generally at times, the “Board’s 2010 Decision”). See San Miguel Hospital Corp., 355 NLRB No. 212. In the Decision, the Board issued a Certification of Representative in the Union’s favor as to the Unit, but declined to grant the Motion for Summary Judgment. Instead, due to the possibility that “events may have occurred during the pendency of the litigation that the parties may wish to bring to [the Board’s attention],” the Board (1) “granted [the General Counsel] leave to amend the complaint on or before October 10, 2010, to conform with the current state of the evidence,” and (2) issued a Notice to Show Cause, whereby Alta Vista was to submit any written opposition to the Motion for Summary Judgment by November 14, 2010, and the General Counsel was to submit any written support for the Motion for Summary Judgment by that same date.

On November 3, 2010, the Regional Director dismissed the RM Petitions due to the pendency of the unfair labor practice charges in Case Nos. 28-CA-21896 and 28-CA-22280, and Alta Vista’s failure to provide the Region with evidence of

“objective considerations” in support of the RM Petitions. On November 22, 2010, Alta Vista filed a timely Request for Review (hereafter, the “Request for Review”) with the Board, which is yet to issue the agency’s ruling(s).

Meanwhile, as concerns the unfair labor practice proceedings in Case No. 28-CA-21896, on November 15, 2010, Alta Vista filed with the Board a Response to the Board’s Notice to Show Cause. In the Response, Alta Vista observed that the General Counsel had not filed any Amended Complaint by the Board’s deadline of October 10, 2010, or for that matter, at any time thereafter, and set forth a variety of arguments as to why the Board should deny the Motion for Summary Judgment. Two weeks later, on December 1, 2010, the General Counsel filed an Opposition to Alta Vista’s Response to the Notice to Show Cause. In the Opposition, the General Counsel opposed the arguments set forth by the Hospital’s Response to the Notice to Show Cause. At the same time, the General Counsel alleged that “Respondent has refused and continues to refuse to bargain with the Union,” and accordingly, requested that the Board grant the Motion for Summary Judgment. See General Counsel’s Opposition, pages 2-3.

On December 7, 2010, Alta Vista filed a Motion to Strike, Alternatively, Reply to General Counsel’s Opposition to Alta Vista’s Response to Notice to Show Cause. In the Motion to Strike, Alta Vista observed that the General Counsel’s Opposition to the Hospital’s Response to Notice to Show Cause

functioned as a de facto Amended Complaint, which, under the Notice to Show Cause, was due by October 10, 2010, as well as a de facto statement in support of the Motion for Summary Judgment, which was due by November 14, 2010. For these reasons, Alta Vista requested that the Board strike the General Counsel's Opposition.

On December 14, 2010, the General Counsel filed a Motion for Special Permission to Amend the Complaint, whereby the General Counsel sought the Board's special permission to amend the Complaint to allege (1) the Board certified the Union as to the Unit on September 30, 2010, (2) the Union sent a request to bargain to Alta Vista on December 10, 2010, and (3) the Hospital failed to respond to the Union's letter and has been refusing to bargain with the Union. On December 23, 2010, Alta Vista filed an Opposition to the General Counsel's Motion for Special Permission to Amend Complaint.

On February 7, 2011, the Board issued an Order in which the agency granted the General Counsel's Motion for Special Permission to Amend Complaint, and set February 14, 2011 as the deadline for the issuance of the Amended Complaint, and February 28, 2011 as the deadline for Alta Vista's Answer to the Amended Complaint.<sup>1</sup> On February 11, 2011, the Board issued a Revised Order, whereby the agency repeated the above-referenced directives, and added that any further

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<sup>1</sup> The Board also denied as moot Alta Vista's Motion to Strike the General Counsel's Opposition to the Hospital's Response to the Notice to Show Cause.



response to the agency's Notice to Show Cause issued on September 30, 2010 should be filed by March 7, 2011.<sup>2</sup>

**5.) Pleadings and Motions Now Before the Board**

On February 14, 2011, the General Counsel issued the Amended Complaint, which carried forward the allegations of the original Complaint and added the allegations that (1) on September 30, 2010, the Union was certified as the exclusive bargaining representative for the Unit, (2) on December 10, 2010, the Union requested that Alta Vista bargain with the Union, and (3) since December 10, 2010, Alta Vista has failed to respond to the Union's request and refused to bargain with the Union. On February 28, 2011, Alta Vista responded to the Amended Complaint with an Answer, which denied the material allegations of the Amended Complaint.

On March 4, 2011, the General Counsel filed the Motion now before the Board, whereby the General Counsel seeks to supplement the Motion for Summary Judgment by the inclusion of the Amended Complaint, the Union's demand to bargain dated December 10, 2010, and Alta Vista's Answer to the Amended Complaint. For the reasons set forth below, the Board should deny the Motion, deny the Motion for Summary Judgment, and grant the Hospital's Cross-Motion for Summary Judgment.

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<sup>2</sup> The Hospital's Undersigned Counsel never received a copy of the Board's Revised Order of February 11, 2011.

## ARGUMENT

In the Motion, the General Counsel seeks to supplement the record to include the Amended Complaint, inclusive of the Union's December 10, 2010 request to bargain attached thereto, together with the Answer to the Amended Complaint. Alta Vista certainly objects to the inclusion of these documents in any record presented to the Board as part of the Motion for Summary Judgment. However, of greater moment, Alta Vista objects to the Motion for Summary Judgment, irrespective of the documents which the General Counsel may wish to add to the attendant record.

As explained above, on September 24, 2010, the Court of Appeals issued the Court's mandate and remanded the above-captioned cases to the Board. Three days later, on September 27, 2010, Alta Vista filed the RM Petitions. Notably, at that time, the Union was not the beneficiary of any valid Certification of Representative. To be sure, on September 30, 2010, the Board did issue a new Certification of Representative in the Union's favor. Nonetheless, the fact remains that, at the time the RM Petitions were filed, the Union was not an incumbent labor organization duly certified by the Board to represent the employees of the Unit. For that reason, the RM Petitions presented a "Question Concerning Representation," and the Region should have scheduled the necessary Elections.



Though the RM Petitions were dismissed by the Regional Director on November 3, 2010, Alta Vista filed a timely Request for Review, which has not yet been ruled upon by the Board. And yet, while the questions of whether the RM Petitions raised a “QCR,” and whether new Elections should take place for the Unit’s employees, remain before the Board, the General Counsel not only seeks to prosecute Alta Vista on account of the Hospital’s refusal to bargain with the Union, but now, requests that the Board summarily rule that Alta Vista’s refusal to bargain violates the Act as a matter of law.<sup>3</sup>

Based upon the pendency of the Request for Review, and the continued viability of the RM Petitions, the General Counsel lacks any proper basis to prosecute Alta Vista for any alleged unlawful refusal to bargain, and certainly lacks any grounds whatsoever to seek an award of summary judgment. To the contrary, based upon these very same reasons, Alta Vista is the party with the entitlement for an award of summary judgment, or at the very least, the dismissal

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<sup>3</sup> At the outset, of course, the Board was the party which effectively empowered the General Counsel to pursue these improper lines of prosecution, insofar as the Board afforded the General Counsel special permission to issue an Amended Complaint, one which the Board originally instructed the General Counsel to issue more than four months previously. For these reasons, Alta Vista believes that the Board has improperly prejudged the merits of the Hospital’s Request for Review, compromised the agency’s ability to rule upon the Request for Review with even the appearance of impartiality, and irreparably violated the Hospital’s due process rights. Accordingly, contemporaneously herewith, Alta Vista has filed a Supplemental Memorandum in Support of the Hospital’s Request for Review.

of the Complaint, both of which the Hospital now, alternatively requests. In support of the Cross-Motion, contemporaneously herewith, Alta Vista has provided the Board with (1) the RM Petitions, and (2) the Request for Review, inclusive of the exhibits.

### **CONCLUSION**

For all the reasons set forth above, Alta Vista respectfully requests that the Board deny the Motion, deny the Motion for Summary Judgment, and grant the Cross-Motion for Summary Judgment.

Dated: March 9, 2011  
Glastonbury, Connecticut

Respectfully submitted,



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UNITED STATES OF AMERICA  
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SAN MIGUEL HOSPITAL CORP. d/b/a  
ALTA VISTA REGIONAL HOSPITAL

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And

DISTRICT 1199NM, NATIONAL UNION OF  
HOSPITAL AND HEALTHCARE EMPLOYEES :

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**CERTIFICATE OF SERVICE OF RESPONDENT / EMPLOYER'S  
OPPOSITION TO ACTING GENERAL COUNSEL'S MOTION TO  
SUPPLEMENT MOTION FOR SUMMARY JUDGMENT AND RECORD,  
AND RESPONDENT / EMPLOYER'S CROSS-MOTION FOR SUMMARY  
JUDGMENT**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the original of the Respondent / Employer's Opposition to Acting General Counsel's Motion to Supplement Motion for Summary Judgment and Record, and Respondent / Employer's Cross-Motion for Summary Judgment (hereafter, the "Opposition / Cross-Motion") is being filed this date by San Miguel Hospital Corporation in the above-captioned matter *via* e-filing at [www.nlrb.gov](http://www.nlrb.gov), being the website maintained by the National Labor Relations Board.

The Undersigned further does hereby certify that a copy of the Opposition / Cross-Motion is being provided this date to the following *via* e-mail:

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Dated: March 9, 2011  
Glastonbury, Connecticut

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bryan T. Carmody", is written over a horizontal line.

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